

**From:** Aranda, Amber [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=2557889D5F134A3DBC525A2DBF6BFDF2-AARANDA]  
**Sent:** 5/18/2021 4:51:31 PM  
**To:** Koch, Erin [Koch.Erin@epa.gov]  
**Subject:** RE: hardeman v monsanto decision  
**Attachments:** In the Matter of Chapman Chemical (June 1985).pdf

Erin – I'll be on the call today with OGC front office, but am assuming you would intro given the timing we discussed. But prompt me if you want me to help in any way.

# Ex. 5 Attorney Client (AC)

Law360 (March 19, 2021, 8:46 PM EDT) -- Bayer AG on Friday announced that it would not be asking the U.S. Supreme Court to review a \$20.6 million verdict awarded to a former school groundskeeper who alleged that Monsanto's weedkiller Roundup caused his cancer.

Bayer said that the decision not to file a petition for certiorari with the high court was made after "careful and extensive consideration." The decision ends the case of Dewayne Johnson, and while Bayer said that it still believes that the state jury's verdict was not supported by the law or evidence, another Roundup verdict is better suited to be reviewed by the Supreme Court.

That case is Edwin Hardeman's \$25 million verdict, which is currently pending before the Ninth Circuit, Bayer said.

"Several factors contribute to making the Johnson case a less desirable candidate for Supreme Court review, including that the underlying opinion was issued by an intermediate level state court and the portion dealing with the key issue of federal preemption is unpublished, and thus will have no bearing on any case besides Johnson," Bayer said.

Hardeman's case, on the other hand, is better suited for the high court's review because the appellate court is expected to release a decision that addresses the most significant federal issues in the litigation, which include preemption and the admissibility of expert evidence, Bayer said.

Johnson's case was the first to go to trial in August 2018, which resulted in an initial \$289 million verdict that was later reduced to \$20.6 million. Since then, more than 100,000 people across the country have filed claims against the company, which Bayer acquired in June 2018 for \$63 billion.

In October, the California Supreme Court refused to take a look at the verdict.

"Bayer and Monsanto saw the writing on the wall — the Johnson verdict was grounded in science and careful application of California law, and the Supreme Court was never going to upset the verdict," R. Brent Wisner of Baum Hedlund Aristei & Goldman PC told Law360. "We are very pleased that Mr. Johnson was able to see justice done before he passed. He is a bona fide American hero."

The Ninth Circuit is currently reviewing the Hardeman case. During a teleconference hearing in October, U.S. Circuit Judge N. Randy Smith seemed skeptical of Monsanto's arguments that the verdict must be overturned because of the U.S. Environmental Protection Agency's approval of the herbicide.

Monsanto's counsel Seth P. Waxman of WilmerHale argued that the jury trial over Hardeman's failure-to-warn claims should never have been held, because his claims are preempted by the EPA's consistent findings that exposure to Roundup's active ingredient, glyphosate, does not cause cancer in humans and no cancer warning is appropriate.

Waxman noted that the EPA has approved 45 versions of the Roundup labels and conducted reviews of the herbicide over decades that have been "nothing short of encyclopedic."

But Judge Smith questioned whether the EPA's approval matters in light of a provision in the Federal Insecticide Fungicide and Rodenticide Act that says "in no event shall registration of an article be construed as a defense" against a FIFRA violation.

The judge added that FIFRA says an herbicide's registration should serve as "prima facie evidence" that its labeling and packaging comply with the act's registration provisions, "but that's it."

Johnson is represented by R. Brent Wisner and Pedram Esfandiary of Baum Hedlund Aristei & Goldman PC, Michael J. Miller, Curtis G. Hoke and Jeffrey A. Travers of the Miller Firm LLC, and Mark E. Burton of Audet & Partners LLP.

Monsanto is represented by David M. Axelrad, Jason R. Litt and Dean A. Bochner of Horvitz & Levy LLP, and K. Lee Marshall of Bryan Cave Leighton Paisner LLP in the Johnson case. The company is represented by Seth P. Waxman of WilmerHale in the Hardeman case.

Hardeman is represented by David Wool of Andrus Wagstaff PC.

The cases are Dewayne Johnson v. Monsanto Co., case number S264158, in the Supreme Court of California and Hardeman v. Monsanto Co., case numbers 19-16253, 19-16255, 19-16636 and 19-16708, in the U.S. Court of Appeals for the Ninth Circuit.

Amber L. Aranda  
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**From:** Koch, Erin <Koch.Erin@epa.gov>  
**Sent:** Tuesday, May 18, 2021 9:23 AM  
**To:** Aranda, Amber <aranda.amber@epa.gov>  
**Subject:** RE: hardeman v monsanto decision

## Ex. 5 Attorney Client (AC)

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**From:** Aranda, Amber <[aranda.amber@epa.gov](mailto:aranda.amber@epa.gov)>  
**Sent:** Monday, May 17, 2021 5:21 PM  
**To:** Koch, Erin <[Koch.Erin@epa.gov](mailto:Koch.Erin@epa.gov)>  
**Subject:** FW: hardeman v monsanto decision

FYI

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**From:** Aranda, Amber  
**Sent:** Monday, May 17, 2021 4:42 PM  
**To:** Oakes, Matthew (ENRD) <[Matthew.Oakes@usdoj.gov](mailto:Matthew.Oakes@usdoj.gov)>  
**Cc:** Neumann, Jennifer Scheller (ENRD) <[Jennifer.Neumann@usdoj.gov](mailto:Jennifer.Neumann@usdoj.gov)>  
**Subject:** RE: hardeman v monsanto decision

My thoughts below

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**From:** Oakes, Matthew (ENRD) <[Matthew.Oakes@usdoj.gov](mailto:Matthew.Oakes@usdoj.gov)>  
**Sent:** Monday, May 17, 2021 3:51 PM  
**To:** Aranda, Amber <[aranda.amber@epa.gov](mailto:aranda.amber@epa.gov)>  
**Cc:** Neumann, Jennifer Scheller (ENRD) <[Jennifer.Neumann@usdoj.gov](mailto:Jennifer.Neumann@usdoj.gov)>  
**Subject:** RE: hardeman v monsanto decision

Thanks Amber —

# Ex. 5 Attorney Client (AC)

# Ex. 5 Attorney Client (AC)

-Matt

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**From:** Aranda, Amber <[aranda.amber@epa.gov](mailto:aranda.amber@epa.gov)>

**Sent:** Monday, May 17, 2021 3:15 PM

**To:** Oakes, Matthew (ENRD) <[Matthew.Oakes@usdoj.gov](mailto:Matthew.Oakes@usdoj.gov)>

**Subject:** RE: hardeman v monsanto decision

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**From:** Oakes, Matthew (ENRD) <[Matthew.Oakes@usdoj.gov](mailto:Matthew.Oakes@usdoj.gov)>

**Sent:** Friday, May 14, 2021 12:28 PM

**To:** Neumann, Jennifer Scheller (ENRD) <[Jennifer.Neumann@usdoj.gov](mailto:Jennifer.Neumann@usdoj.gov)>; [justin.smith@usdoj.gov](mailto:justin.smith@usdoj.gov); Koch, Erin <[Koch.Erin@epa.gov](mailto:Koch.Erin@epa.gov)>; Perlis, Robert <[Perlis.Robert@epa.gov](mailto:Perlis.Robert@epa.gov)>; Aranda, Amber <[aranda.amber@epa.gov](mailto:aranda.amber@epa.gov)>

**Subject:** hardeman v monsanto decision

The 9<sup>th</sup> Circuit opinion in the Hardeman v. Monsanto case just came out. This is the case where we filed an amicus brief arguing that any California state-based labeling requirements were preempted by FIFRA. The 9<sup>th</sup> Cir. affirmed the judgment of the district court and found that California law was consistent with FIFRA. I haven't read the decision yet (it's long). I'll follow up if there is more to report.

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